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Expert Witness Fees

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EXPERT WITNESS FEES

In order to obtain the testimony of an expert witness, a party in a civil suit or the defendant in a criminal trial will customarily pay the expert compensation for his services in addition to the ordinary witness' fees required by statute. The expert witness, whose role is quite different from that of the ordinary witness narrating first hand evidence of the case,[1] is asked to use the special skills that he has spent years in acquiring, and which he employs to earn a living. Under these circumstances, special compensation seems warranted.[2] However, the justified expectations of the expert present a significant problem to the impecuni-

1. The courts distinguish between the case of the expert who is required to prepare specially for his appearance as a witness, and one who is simply asked to answer questions calling for his professional judgment without pre-trial preparation. In the former situation he will be entitled to additional compensation. Gordon v. Conley, 107 Me. 286, 290, 78 Atl. 365, 366 (1910) (physician employed by defendant's attorneys to examine her physical condition and thus qualify as an expert witness; judgment for the plaintiff-physician for "whatever his services are reasonably worth above the legal fee due to the ordinary witness"); Stevens v. Worcester, 196 Mass. 45, 56, 81 N.E. 907, 910 (1907) (expert witness could be required to express an opinion if he had one, but he ". . . could not be compelled to study the case or perform labor in order to qualify him to express an opinion"); Tiffany v. Kellogg Iron Works, 59 Misc. 113, 109 N.Y.Supp. 754, 755 (Sup. Ct. 1908) (engineer asked to make a computation to qualify himself to testify; claim for compensation for extra work preparatory to testifying allowed); Edwards v. Prutzman, 108 Pa. Super. 184, 165 Atl. 255 (1933) (judge called upon handwriting expert to examine certain ballots to determine whether the marks thereon were fraudulent; trial court's decree directing payment of expert's bill found to be proper). *Contra:* Chicago & Northwestern Ry. v. Friend, 86 Ill. App. 157, 159 (1898) (medical expert prepared a report and claimed compensation for the time spent in such preparation; court held that the preparation ". . . was not, in itself, expert professional labor, calling for knowledge or medical or surgical skill . . ."). If, however, the expert should happen to see a collision between two automobiles and is called upon to testify as to what he saw, it is hardly arguable that he is entitled to any more compensation than the ordinary witness.

2. Webb v. Page, 1 Carr. & K. 23 (1843); Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75 (1877); Dills v. State, 59 Ind. 15 (1877); People *ex rel.* Kraushaar Bros. & Co. v. Thorpe, 296 N.Y., 223, 72 N.E.2d 165 (1947) (real estate appraiser); Birch v. Sees, 178 App. Div. 609, 165 N.Y.Supp. 846 (2d Dep't 1917) (physician); Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 105 Atl. 630 (1918); ORDRONAUX, JURISPRUDENCE OF MEDICINE 140 (1869); Bomar, *The Compensation of Expert Witnesses,* 2 LAW & CONTEMP. PROB. 510, 522 (1935). In the case of the document examiner, for example, in order to render an expert opinion in court, supported by sufficient examples and comparisons to indicate how the judgment was arrived at and why or to what extent the expert himself is convinced it is correct, he must prepare photographs, enlargements, and exhibits for the judge and jury to examine. Since he earns a living at this sort of work, it would be unjust to deny him a fee.

ous litigant who may need the benefit of his testimony.[3] It would appear from considerations of justice that the indigent party should, as nearly as practicable, be given the same opportunity to obtain the testimony of an expert witness as his wealthier opponent. How then can the indigent party procure such expert testimony? And how can the expert be assured an adequate compensation for his time and effort?

Judicial decisions on the subject of expert witness fees offer a number of ways of dealing with the problem, but no satisfactory over-all solution. It appears that the greater number of jurisdictions are willing to compel the expert witness to appear in court without the right to demand compensation other than the ordinary witness fees,[4] unless he is required to do extra work by way of preparation.[5] Some of these courts even hold that any agreement to pay more than the ordinary witness fees is invalid for lack of consideration.[6] This approach enables the indigent party to obtain expert testimony, but does not provide any way of paying the expert for his time and professional advice. It also leaves the indigent party at some disadvantage in that the subpoenaed witness will not, ordinarily, be as cooperative and give as much thought to the problem as the one who has agreed to appear.[7]

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3. Wall v. Brim, 138 F.2d 478 (5th Cir. 1943) (malpractice suit in which plaintiff failed to produce expert testimony and lost; the court held that opinion evidence if not that of an expert is inadmissable where the the issue is whether a physician exercised the requisite care and skill in treating a patient); Hull v. Plume, 131 N.J.L. 511, 512, 37 A.2d 53 (1944) (malpractice suit in which defendant was granted a nonsuit, "because there was no professional or expert testimony upon the question of negligence").

4. Bradley v. Davidson, 47 App.D.C. 266, 285 (1918); *Ex parte* Dement, 53 Ala. 389, 25 Am. Rep. 611 (1875); Flinn v. Prairie County, 60 Ark. 204, 207, 29 S.W. 459 (1895) (expert summoned to testify by the state; court refused to allow him expert's fees in the absence of any statutory authorization of extra compensation for experts); Swope v. State, 145 Kan. 928, 67 P.2d 416 (1937); Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897) (physician subpoenaed to testify as medical expert and refused to do so unless offered a fee of $10; he was fined for contempt of court and on appeal from the fine the court held that no additional fee need be paid to such a witness not required to practice his healing art but merely to answer a question peculiarly within his special knowledge, Walker v. Cook, 33 Ill. App. 561, 565 (1889); Brown County v. Hall, 61 S.D. 568, 569, 249 N.W. 253 (1933); Board of Commissioners of Larimer County v. Lee, 3 Colo. App. 177, 179, 32 Pac. 841 (1893); Burnett v. Freeman, 125 Mo.App. 683, 103 S.W. 121 (1907); Summers v. State, 5 Tex.App. 365, 377, 32 Am. Rep. 573 (1879); see also 8 WIGMORE, EVIDENCE §2203 (3d ed. 1940).

5. See note 2 *supra;* see also dicta in Dixon v. People, 168 Ill. 179, 48 N.E. 108, 110 (1897), and Burnett v. Freeman, 125 Mo.App. 683, 103 S.W. 121, 122 (1907).

6. Burnett v. Freeman, 125 Mo.App. 683, 103 S.W. 121, 123 (1907); Walker v. Cook, 33 Ill.App. 561, 565 (1889) (duty to testify once the expert is served with a subpoena, so that there is no consideration for an agreement to pay additional compensation); Dodge v. Stiles, 26 Conn. 463, 465 (1857) ("It can not be important in our view, whether the promise be made after the service of the subpoena, co-temporaneously with it, or before, provided the promise refers to this duty [to testify] and is founded on no other consideration").

7. The expert is aware that if served with a subpoena he will not be paid any more than the statutory fee prescribed for ordinary witnesses. He will have to answer the questions put to him, but he may be unable to form an expert opinion without some previous study of the problem, or, as in the case of the document examiner, an examination of the handwriting specimens, questioned documents, etc., with the aid of some of his

Some jurisdictions, on the other hand, will not compel the expert to give an opinion calling for the exercise of his professional judgment, when he has not been offered reasonable compensation for the use of his skills.[8] Although there are no decisions directly in point, there should be no objection in these jurisdictions to the expert's being compelled to testify after he has been offered reasonable compensation, since he would then receive payment for his special services.[9] Since the expert is under no legal duty to testify without being offered a reasonable fee, no problem of consideration for the fee exists so long as it is not in excess of a reasonable amount.[10] Logically, however, his willingness to testify will not constitute sufficient consideration for a fee in excess of a reasonable amount, since he would be under a legal duty to testify for less.[11] This approach gives adequate protection to the interests of the expert, but does not solve the problems of the litigant who cannot afford to pay more than the statutory fee.

A possible solution for the indigent litigant who wants to hire an expert witness is the contingent fee contract. In *Barnes v. Boatman's National Bank,*[12] such a contract was utilized by a party-litigant who, in contesting a will, employed a psychiatrist whose fee was to be contingent upon the outcome of the case. The contract was held valid by the Mis-

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equipment. Thus, as a practical matter, the expert must ordinarily be employed at a suitable fee.

8. See note 3 *supra.*

9. See note 3 *supra.* In this situation, the expert witness and the party who seeks his services may agree on a suitable fee before the trial, or it may be understood that the expert will submit a bill when his services are completed. It is often wiser for the expert to reach some understanding with his employer concerning his charges for the work involved before the lawsuit, if there is one pending; otherwise he may find it difficult to collect even the most reasonable charges. One writer suggests that in any case the expert should be prompt in submitting his bill, or reach an understanding as to when he is to be paid, and then remind the client of the expected remuneration immediately before the suit. "Interest is the spur that prompts payment. Indifference grows with time, especially after work is finished." *Collecting from Clients,* 4 DOCKET 3599 (April, 1933).

10. Stanton v. Rushmore, 11 N.J.Misc. 544, 166 Atl. 707 (1933), *aff'd,* 112 N.J.L. 115, 169 Atl. 721 (1934) (the court held that a contract calling for a suitable fee was not void as against public policy or for lack of consideration, even though the physician was subpoenaed); Barrus v. Phaneuf, 166 Mass. 123, 44 N.E. 141 (1896).

11. Except in United States v. Cooper, 21 D.C. 491, 493 (1893), this point apparently has not been passed upon. Here, the court states that the witness can be compelled to testify "where his reasonable fees, beyond the common witness fees, had been tendered him." The opinion cites as authority *Ex parte* Roelker, 20 Fed. Cas. 1092 (1st Cir. 1854). This case, however, stands only for the proposition that an expert in a particular profession (here, a German interpreter) cannot be compelled to testify so long as other experts in the same profession "might without difficulty, be induced to attend for an adequate compensation. . . ." See also Bomar, *The Compensation of Expert Witnesses,* 2 LAW & CONTEMP. PROB. 510 (1935), who, on the authority of United States v. Cooper, *supra,* states that, "it has been held that there is a duty to testify after 'reasonable fees' beyond the statutory fees have been tendered. . . . Certainly, there should be no doubt on this point. To allow the expert to demand a prohibitive fee and refuse to testify would be to allow him to defeat justice by withholding testimony necessary for a proper determination of the case." *Id.* at 516.

12. 348 Mo. 1032, 1 156 S.W.2d 597 (1941).

souri court in spite of objections that such an agreement was unsupported by consideration and was against public policy because it encouraged perjured testimony.[13] Dealing with the consideration problem, the court distinguished between a contract for an expert to testify "on a subject with which he is already conversant," and one requiring him "to especially fit himself for lines of inquiry."[14] In the first case, "it is against public policy to pay anything other than the regular witness fee . . .;" in the second, he is entitled to additional compensation for performing "professional services and the like."[15] In effect, this is the same view taken by some jurisdictions in regard to the consideration problem—that a contract for compensation in addition to the statutory fee would not be invalid for lack of consideration where the expert is asked to do additional work in preparation for testifying.[16]

In order to meet the objection that the contract is invalid because it encourages perjured testimony, the court in the *Barnes* case found that the services rendered before trial are the subject matter of the contract, and the expert's testimony was only an incidental objective.[17] Whatever the merits of this line of reasoning, it has not been accepted in other jurisdictions, and such contingent fee contracts in which the expert is expected to testify have uniformly been held invalid where the question has arisen.[18] The expert himself will frequently refuse to testify on such a basis, either because of knowledge of the unenforceability of such contracts or because of personal distaste for them. He may, however, be asked to work for a client whose ability to pay his fee will depend on the outcome of anticipated litigation. Here the fee will be due and payable regardless of the outcome of the suit or criminal trial, although the expert is aware that he will probably be unable to collect if his client loses. The honest expert may take the risk of not being paid, or may simply refuse to testify. Others might find it convenient to alter their judgment in order to produce the desired result in the litigation. Consequently, the same public policy objection would appear to apply

13. *Id.* at 1041, 156 S.W.2d at 602. *Contra:* Miller v. Anderson, 183 Wis. 163, 196 N.W. 869 (1924); Sherman v. Burton, 165 Mich. 293, 297, 130 N.W. 667, 668 (1911); Davis v. Smoot, 176 N.C. 538, 541, 97 S.E. 488, 489 (1918); for a strong criticism of the *Barnes* decision, see Morgan, *The Law of Evidence,* 1941-1945, 59 HARV. L. REV. 481, 534 (1946).

14. Barnes v. Boatman's National Bank, 348 Mo. 1032, 1038, 156 S.W.2d 597, 601 (1941).

15. *Ibid.* This was the holding in Burnett v. Freeman, 125 Mo.App. 683, 103 S.W. 121 (1907).

16. See note 2 *supra.* In the *Barnes* case the expert was asked to do extra work by way of (1) preparing himself to testify, and (2) advising counsel in the case. 348 Mo. at 1039, 156 S.W.2d at 601.

17. Barnes v. Boatman's National Bank, *supra* note 16.

18. See note 13 *supra;* see also 6 WILLISTON, CONTRACTS §1716, n. 4 (Rev. ed. 1938), containing cases on this point.

whether the fee is contingent because expressly made so, or contingent because of the probability that it will be uncollectible in case of an unfavorable result in the litigation.

The American Law Institute has offered an alternative solution which is intended to secure unbiased expert testimony for all litigants. The Model Code of Evidence, in Rules 403 through 410, provides for court-appointed experts whose compensation for testimony in a criminal action is to be fixed by the court and paid by the county or state. In a civil suit, compensation would be paid "by the parties in such proportions and at such times as he [the trial judge] shall prescribe . . .," or by the county or state in whatever proportion the court decides.[19] The Model Code does not prohibit parties from hiring their own expert witnesses;[20] it merely attempts to discourage this practice by providing that, "The fee of an expert witness called by a party but not appointed by the judge shall be paid by the party calling him but shall not be taxed as costs in the action."[21]

There are objections to the approach of the Model Code in that it may increase the costs of litigation to the county or state, especially in a criminal trial, and may unduly burden members of the various professions who are appointed to testify repeatedly. It would seem, however, that the latter objection could be met simply enough by not requiring the testimony of an unwilling witness when others are readily available. As to the former objection, it seems the cost assessed against the county

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19. MODEL CODE OF EVIDENCE, Rule 403 (1942), provides for the appointment of expert witnesses by the trial judge, "on his own motion or at the request of a party. . . ." Rule 410 provides:

"The compensation of each expert witness appointed by the judge shall be fixed at a reasonable amount. In a criminal action it shall be paid by [insert the name of the proper public authority] under order of the judge. In a civil action it shall be paid . . . by the parties in such proportions and at such times as he shall prescribe, or that the proportion of any party be paid by [insert the name of the proper public authority], and that, after payment by the parties or [insert the name of the public authority] or both, all or part or none of it be taxed as costs in the action. Any witness appointed by the judge who receives any compensation other than that fixed by the judge and any person who pays or offers or promises to pay such other compensation shall be guilty of contempt of court. . . ."

See also MODEL CODE OF EVIDENCE 215 (1942): "No doubt in the usual case the judge will provide that the expense of the experts shall be taxed as costs and paid by the loser [in civil cases]. . . . He may [on the other hand] think it wise to excuse an impecunious party from paying his proportionate share. . . ."

20. MODEL CODE OF EVIDENCE, Rule 404, provides that a party may call his own expert witness, "if the judge finds that

a) the party has given reasonable notice to each adverse party of the name and address of the witness to be called, or

b) it is expedient, notwithstanding a failure to give such notice, to permit the witness to be called."

21. MODEL CODE OF EVIDENCE, Rule 410.

or state in a criminal action is not too great a price to pay for unbiased expert testimony in the interests of greater justice.[22]

Under Rule 403, presumably, a party would have little difficulty in persuading the judge to appoint an expert witness, if he could convince him that such testimony would "be of substantial assistance."[23] Furthermore, the judge can, under Rule 405, "on his own motion or that of a party," require the expert to "make such inspection and examination of the person, thing, place or matter concerning which he is to give evidence as the judge deems necessary. . . ."[24] Thus, there should be no problem for the litigant who wishes to have the expert witness examine depositions or questioned documents, or compare specimens of handwriting.[25]

Some objections to Rule 405 may remain insofar as it could enable the court to compel an unwilling expert to make pre-trial examinations or investigations or perform other services not involving the giving of testimony. There appears to be a fear in some jurisdictions that an expert who is compelled to perform such services may be unduly burdened.[26] This problem was met in the Federal Rules of Criminal Procedure, Rule 28, by providing that, "An expert witness shall not be appointed by the court unless he consents to act. . . ."[27] A similar pro-

22. In support of the court-appointed expert provided for in Rules 403 thru 410, see McCormick, *Science, Experts and the Courts,* 29 TEXAS L. REV. 611, 623 (1951).

23. MODEL CODE OF EVIDENCE, Rule 403 (1942), provides, in part, "In an action in which the judge determines that expert evidence will be of substantial assistance, he may, of his own motion or at the request of a party, at any time during the pendency of the action. . . .

b) appoint one or more expert witnesses . . . to give evidence in the action. . . ."

24. *Ibid.* Under Rule 405, "the scope and manner of the inspection or examination . . . as to which a dispute has arisen . . ." is to be determined by the judge.

25. A problem not, apparently, covered by the Model Code, is that of the indigent party who wants an expert to advise his attorney on what questions to ask of the expert witnesses who are called to testify. This problem does not properly belong within the scope of the Model Code's Chapter V, since such an expert would not, in all probability, be permitted to testify. For this limited purpose, the contingent fee contract may be a proper solution, so long as it is understood that the expert so employed will not be called upon to testify.

26. Stevens v. Worcester, 196, Mass. 45, 56, 81 N.E. 907, 910 (1907) ("The auditor rightly ruled that the witness . . . could not be compelled to study the case or perform labor in order to qualify him to express an opinion. . . .") "The coroner might have compelled him [the physician] to swear to his opinion on a superficial view of the body; but he could not have compelled him to touch it, or do the more nauseous and dangerous work of opening it." Allegheny County v. Watt, 3 Pa. St. 462, 464 (1846). Two states have statutes which enable the trial judge to compel the expert to make such an examination. IDAHO CODE tit. 19, §4303 (1948); TENN. STAT. tit. 5, §§11882, 11883 (1943).

27. FED. F. CRIM. P., Rule 28, provides:

"The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. . . . The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection."

Similar provisions are to be found in: WIS. STATS. §357.27(1)(1951); CAL. PEN. CODE §1027 (Deering, 1951).